90-26

Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

October Term, 1989

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

vs.

GLEN THEATRE, INC., *et al.*; DARLENE MILLER, *et al.*; and CIVIL CITY OF SOUTH BEND, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether nude barroom-style dancing is to be granted per se protection as "speech" under the First Amendment?

2. If nude dancing which is not obscene is protected "speech," whether Indiana's general public indecency law, Ind. Code § 35-45-4-1, is unconstitutional as applied to such dancing?

LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Court of Appeals for the Seventh Circuit; the petitioners in this Court are italicized, all others are respondents:

NO. 88-3006

Plaintiffs-Appellants: Darlene Miller; JR's Kitty Kat Lounge, Inc.

Defendants-Appellees: Civil City of South Bend, Indiana; *Indiana Alcoholic Beverage Commission;* Charles Hurley, Chief of Police of South Bend Police Department; *Michael P. Barnes, Prosecuting Attorney for St. Joseph County, Indiana; Linley E. Pearson, Attorney General of Indiana.*

No. 88-3244

Plaintiffs-Appellants: Glen Theatre, Inc.; Gayle Ann Marie Sutro; Carla Johnson.

Defendants-Appellees: Civil City of South Bend, Indiana; Charles Hurley, Chief of Police of South Bend Police Department; *Michael P. Barnes, Prosecuting Attorney for St. Joseph County, Indiana; Linley E. Pearson, Attorney General of Indiana.*

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, sitting en banc, entered in *Darlene Miller, et al. v. Civil City of South Bend, et al.*, Nos. 88-3006 & 88-3244, on May 24, 1990. The judgment reversed the United States District Court for the Northern District of Indiana, and enjoined the petitioners from enforcing Indiana's public indecency statute against the respondents

based on their presentation and performance of nonobscene nude dancing.

OPINIONS BELOW

The divided en banc decision of the Seventh Circuit of May 24, 1990 has not yet been reported. The majority opinion and dissents thereto are reprinted in the Appendix at page 1. The vacated panel decision of the Seventh Circuit of October 19, 1989 is reported at 887 F.2d 826, and is reprinted in the Appendix at page 112.

The decision of the district court of September 9, 1988, on remand from the first appeal, is reported at 695 F.Supp. 414, and is reprinted in the Appendix at page 120.

The first decision of the Seventh Circuit of September 30, 1986 is reported at 802 F.2d 287, and is reprinted in the Appendix at page 140.

The original decision of the district court granting a preliminary injunction on July 26, 1985, and its order making the injunction permanent on October 10, 1985, are not reported, and are reprinted in the Appendix beginning at page 148.

JURISDICTION

The judgment to be reviewed was entered on May 24, 1990. No petition to rehear the judgment was filed.

An earlier judgment, entered by a panel of the court of appeals on October 19, 1989, was vacated by an order granting rehearing en banc on January 9, 1990 (App. 110-111).

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The statute under review in this case, Ind. Code § 35-45-4-1, provides in pertinent part:

> (a) A person who knowingly or intentionally, in a public place:
>
> (1) engages in sexual intercourse;
>
> (2) engages in deviate sexual conduct;
>
> (3) appears in a state of nudity; or
>
> (4) fondles the genitals of himself or another person;
>
> commits public indecency, a Class A misdemeanor.
>
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

STATEMENT OF THE CASE

Facts

The district court described the dancing of one of the respondents as follows:

> Ms. Miller sells drinks and dances at the Kitty Kat. She has worked at the Kitty Kat for about two years and currently makes $250.00 to $300.00 per week. When she dances, Ms. Miller perceives herself as "just entertaining, just dancing." The avowed purpose of her dance is to try to get customers to like her so that they will buy more drinks later. Ms. Miller dances "go-go," sometimes fast, sometimes slow. She

> dances to music from a juke box. Ms. Miller wants to dance nude because she believes she would make more money doing so; at present, she wears "pasties" and a "g-string" when she dances, for fear of arrest.

695 F.Supp. at 420 (App. 133).

Respondent Glen Theatre, Inc. runs a business called the "Chippewa Bookstore" offering, among other things, booths with glass panels through which paying adults can view nude women dancing on a stage. No alcoholic beverages are sold or permitted in the "bookstore." According to an affidavit of respondent Gayle Sutro, her nude dances "are appropriately choreographed and are an attempt to communicate as well as entertain." 695 F.Supp. at 420 (App. 131-132).

A videotape of the nude dancing was submitted to the district court, which described it as follows:

> The tape consists of four separate performances. The performances are basically identical. They consist of a female, fully clothed initially, who dances to one or more songs as she proceeds to remove her clothing. Each dance ends with the dancer totally nude or nearly nude. The dances are done on a stage or on a bar and are not a part of any type of play or dramatic performance. They are simply what are commonly referred to as "striptease" acts.

695 F.Supp. at 416 (App. 124). Based on this evidence, the district court found that "the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States," and that the dances are "mere conduct." *Id.* at 419 (App. 130).

There was no dispute that the defendant law enforcement officials had arrested and prosecuted dancers for violations of Indiana's public indecency statute, Ind. Code § 35-45-4-1, and would do so in the future. The Indiana Supreme Court had previously upheld the statute against a First Amendment challenge, *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931

(1980), and *Dove v. Indiana*, 449 U.S. 806 (1980); and had affirmed convictions thereunder, *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984).

In *Baysinger*, the Indiana Supreme Court construed Ind. Code § 35-45-4-1 to proscribe only conduct "traditionally . . . held to be public indecency," and not nudity "as a part of some larger form of expression meriting protection, when the communication of ideas is involved." 397 N.E.2d at 587. Thus construed, the court found that the statute was not overbroad, and further that the nude barroom dancing at issue in the case was mere conduct without the expression of ideas. This Court dismissed appeals from this ruling for want of a substantial federal question. *Clark v. Indiana*, 446 U.S. 931 (1980), and *Dove v. Indiana*, 449 U.S. 806 (1980).

Proceedings Below

This litigation began with three separate actions under 28 U.S.C. § 1343(a)(3) (original action to redress deprivation of civil rights) and § 2202 (declaratory judgment) filed in the district court in 1985. Glen Theatre, Inc., Gayle Ann Marie Sutro, and Carla Johnson (the "*Glen Theatre*" plaintiffs) sued the City of South Bend, the city police chief, the county prosecutor, and the state attorney general. Darlene Miller and JR's Kitty Kat Lounge, Inc. (the "*Miller*" plaintiffs) sued the above officials and the Indiana Alcoholic Beverage Commission, as did Sandy Diamond, Lynn Jacobs, 720 Corporation ("Ramona's Car Wash") and 726 Corporation ("Ace-Hi Lounge") (the "*Diamond*" plaintiffs).

The plaintiffs sought injunctive relief prohibiting the defendants from enforcing § 35-45-4-1 against them on the basis of nude dancing they wished to perform. They claimed that enforcement of the statute, requiring them to wear "pasties" and "g-strings" while dancing, would violate their right to freedom of speech under the First Amendment.

In *Glen Theatre*, the district court found the public indecency statute to be facially unconstitutional for overbreadth,

and granted a preliminary injunction which was made permanent on October 10, 1985. (App. 148 *et seq.*) The Seventh Circuit reversed, finding that this Court's dismissal of the *Baysinger* appeals for want of a substantial federal question constituted an affirmance of *Baysinger's* holding that the statute was not overbroad. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287, 288-290 (7th Cir. 1986) (App. 142-146). The case was remanded to the district court for the plaintiffs to pursue their argument that the statute violated the First Amendment as applied to their nude dancing. *Id.* at 290 (App. 146). The district court was instructed to "examine the plaintiffs' proffered evidence of the dancing they wish to perform" and decide whether "the activity should be afforded First Amendment protection." *Id.* at 291 (App. 147).

On remand *Glen Theatre* was consolidated with the *Miller* and *Diamond* cases (in which preliminary injunctions had been denied). A videotape of four nude dances was submitted as evidence of the dancing the plaintiffs wished to perform. After reviewing the tape and relying on the factual findings previously made, the district court concluded that "the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States." Judgment was entered in favor of the defendants in all three cases. *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F.Supp. 414, 419 (N.D. Ind. 1988) (App. 130).[1]

Appeals were taken by the *Glen Theatre* and *Miller* plaintiffs. A panel of the Seventh Circuit[2] reversed the district court on October 19, 1989, ignoring the finding the district court was instructed to make on remand, and instead holding as a matter of law that all nonobscene nude dancing performed for entertainment is "expression" protected by the First Amendment. *Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989) (App. 112).

[1] The district court originally found the action to be moot as to the *Glen Theatre* plaintiffs, based on information that their business had been destroyed by fire. 695 F.Supp. at 416 (App. 124). Pursuant to a post-judgment motion, however, the court found that the case was not moot, and made the judgment effective as to the *Glen Theatre* plaintiffs as well. (App. 136-139.)

[2] The opinion was authored by Judge Flaum and joined by Judges Wood and Coffey.

The petitioners petitioned for rehearing en banc, and the Seventh Circuit granted rehearing en banc and vacated the panel decision on January 8, 1990. (App. 110-111.) On rehearing, by a vote of seven to four,[3] the Seventh Circuit again reversed the district court, and enjoined the defendant officials from enforcing the public indecency statute against the plaintiff businesses and dancers. (App. 1 *et seq.*)

The majority, acknowledging that this Court has not been directly presented with the issue, held that, "as a matter of law, non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment." (App. 8 & n. 3.) The majority found that the plaintiffs' nude dancing communicated an "emotional" theme of "eroticism and sensuality" (App. 11), and that the district court's finding of no expression in the dances was clearly erroneous (App. 11 n. 5). Finally, the majority concluded that Indiana's "laudable concerns" in prohibiting public nude dancing were insufficient to justify a restriction on the expression involved therein, but that Indiana could regulate the presentation of nude dancing by imposing reasonable time, place, and manner restrictions. (App. 14-16.)

[3] The majority opinion was authored by Judge Flaum. Judges Coffey, Easterbrook, Manion, and Kanne dissented in three separate opinions. (App. 48, 78, 101.)

REASONS FOR GRANTING THE WRIT

I. WHETHER NUDE BARROOM DANCING IS "SPEECH" PROTECTED BY THE FIRST AMENDMENT, OR IS REGULABLE BY A GENERAL PUBLIC INDECENCY STATUTE, ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

A. The status of nude dancing under the First Amendment has not been resolved by this Court.

Lacking a clear resolution of the issue by this Court, lower courts such as the Seventh Circuit in this case are left to try to "envision what the Supreme Court would hold if directly presented with the issue." (App. 8 n. 3; see also App. 93-96, Easterbrook, J. dissenting.) In *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 947 (11th Cir.), *cert. denied* 459 U.S. 859 (1982), the court avoided the need to "gamble" on how a majority of this Court would rule. See also *International Food & Beverage Systems v. City of Ft. Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986) (taking it "for granted" that nude dancing is protected); *Krueger v. City of Pensacola*, 759 F.2d 851, 854 & n. 4 (11th Cir. 1985) (noting that issue is undecided, and basing decision on "potential" for infringement on protected expression); *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287, 289-291 (7th Cir. 1986) (App. 145-146).

A review of this Court's decisions shows that the status of nonobscene nude dancing under the First Amendment has not been settled. In *California v. LaRue*, 409 U.S. 109 (1972), the Court reviewed regulations of sexual conduct in nightclubs and bars that went far beyond simple nude dancing, and also included the showing of films. *Id.* at 111. In upholding the regulations as within the States' police powers under the Twenty-first Amendment, the Court noted that "at least some of the performances . . . are within the limits of the constitutional protection of freedom of expression," *id.* at 118. But the Court did not specify which performances were protected; such a holding was unnecessary given the disposition of the case.

The case of *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), was limited to whether the district court had abused its discretion in preliminarily enjoining enforcement of a local ordinance which prohibited waitresses, barmaids, and entertainers to appear with uncovered breasts. While most of the opinion discussed the issue of abstention, the Court discussed the plaintiffs' likelihood of success on the merits with the following qualified comment:

> Although the customary "bar room" type of nude dancing *may* involve only the barest minimum of protected expression, we recognized in *California v. LaRue*, 409 U.S. 109, 118 (1972), that this form of entertainment *might* be entitled to First and Fourteenth Amendment protection *under some circumstances*. In *LaRue*, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing as a part of its liquor license program.

422 U.S. at 932-933 (emphases supplied). Without deciding the point, the Court agreed with the district court's concern that the ordinance was overbroad as possibly including a theatre, opera house, or ballet production.

The decision in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), is often cited for the proposition that nude dancing is protected by the First Amendment. However, the zoning ordinance at issue in *Schad* banned *all* live entertainment. The Court noted that "live entertainment, such as musical and dramatic works," is protected by the First Amendment, *id.* at 65, and that nude dancing is "not without its First Amendment protections from official regulation," *id.* at 66. But again clarification was unnecessary:

> Whatever First Amendment protection should be extended to nude dancing, live or on film, however, the Mount Ephraim ordinance prohibits all live entertainment in the Borough: no property in the

> Borough may be principally used for the commercial production of plays, concerts, musicals, dance, or any other form of live entertainment.

452 U.S. at 66 (footnote omitted). Given the broad scope of the ordinance, the Court struck it down as being overbroad and inadequately supported by a substantial government interest.

In three cases decided after *Schad*, dissenting Justices (including the author of the *Schad* decision, Justice White) have urged that the nude dancing issue be addressed. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718-719, 723 (1981) (Stevens, J. dissenting); *Young v. Arkansas*, 474 U.S. 1070, 1072 (1986) (White, J. joined by Brennan, J. dissenting from denial of certiorari); see *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 97-103 (1986) (Stevens, J. joined by Brennan, J. dissenting).

Contrary to the suggestion of the Seventh Circuit majority (App. 7), this Court's ruling that indecent "dial-a-porn" recordings are protected sexual expression in *Sable Communications v. FCC*, 492 U.S. ___, ___, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93, 105 (1989), did not amount to a holding that nonexpressive nude dancing is protected as well. Neither did the plurality's citation to *Schad* in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. ___, ___, 110 S.Ct. 596, 604, 107 L.Ed.2d 603, 617 (1990), resolve the issue, where the plurality was simply noting that the City of Dallas had conceded First Amendment protection of at least some of the broad range of "sexually explicit speech" targeted by its ordinance. The reference to *Schad* merely pointed out the probable basis for the City's concession.

B. The Seventh Circuit's novel holding that all non-obscene nude dancing is "speech," and cannot be proscribed by a content-neutral public indecency law, potentially invalidates indecency or nudity statutes in many states.

After holding that nude dancing (as distinguished from dancing with "pasties" and a "g-string") is "speech," the Seventh

Circuit majority held that Indiana's only restriction on public nudity, Ind. Code § 35-45-4-1, is not a valid restriction on that "speech." The majority's reasoning, and potential applicability to other state laws, are remarkable for several reasons.

The holding that all nude dancing is "speech" *per se* contravenes the well established principle that "speech" must be imbued with elements of communication, whether it be symbolic conduct such as burning a draft card or flag,[4] or an art form such as film, music, or musical theatre.[5] The rejection of the district court's finding also denies the factual nature of this Court's test to determine if conduct is "speech," *i.e.*, whether a particularized message is intended, and the same message is likely to be understood by viewers. *Spence v. Washington*, 418 U.S. 405, 409-411 (1974); *Texas v. Johnson*, 491 U.S. ___, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342, 353 (1989).

Assuming for the moment that all *dance* is "speech," the Seventh Circuit has further concluded that *nudity* in dance is also "speech." The majority apparently rejected the view, expressed in dissent, that nudity is no more than a *manner* of dancing rather than a form of expression in and of itself. (App. 69-70, Coffey, J. dissenting.)

And perhaps most remarkably, the majority found that Indiana's public indecency statute, which requires *de minimis* clothing of every person in any public place, is not a content-neutral regulation of conduct. Instead, in the absence of legislative history (Indiana does not record legislative history), the

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[4] *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card); *Texas v. Johnson*, 491 U.S. ___, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (flag).

[5] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (movies are "a significant medium for the *communication* of ideas"); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-558 (1975) ("theatre usually is the acting out - or singing out - of the written word"); *Ward v. Rock Against Racism*, 491 U.S. ___, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661, 674 (1989) ("Music, as a form of expression *and communication*, is protected under the First Amendment.") (all emphases supplied).

majority characterized the statute as an "attempt to ban nude dancing" which is "*directly* related to the suppression of free expression." (App. 14 & n. 7, emphasis in original.) This reasoning calls into question the public indecency statutes of many states, not to mention the common law crime of indecent exposure as it existed at the time of the ratification of the First Amendment.

Indecent exposure of one's body was a crime at common law, considered to be *malum in se*. *City Court of City of Tucson v. Lee*, 16 Ariz. App. 449, 494 P.2d 54, 57 (1972) (and sources cited therein); see also *Ardery v. State*, 56 Ind. 328, 329-330 (Ind. 1877) (noting origins in Adam and Eve's donning of fig-leaf aprons); *Noblett v. Commonwealth*, 194 Va. 241, 72 S.E.2d 241, 243-244 (1952). Most if not all of the States have some type of statute prohibiting people from exposing themselves in public. (App. 54, Coffey, J. dissenting; App. 101, Manion, J. dissenting; see 3 *Wharton's Criminal Law* §§ 317-318 (C. Torcia 14th ed. 1980); 67 C.J.S. *Obscenity* §§ 10-11 (1978)).

Any public nudity law is called into question by the Seventh Circuit's reasoning, which is not limited to nude dancing inside bars and "bookstores" before consenting adults:

> Throughout this opinion, we use the general term "nude dancing" to refer specifically to non-obscene nude dancing of the barroom variety performed as entertainment.

(App. 3 n. 2.) What distinguishes this dancing, for the majority, is its "erotic message" and entertainment value, not the fact that it is performed indoors. It is not hyperbolic to suggest that the Seventh Circuit's holding brings within the First Amendment any person who appears nude in any public place, as long as he or she is dancing. (App. 91, Easterbrook, J. dissenting.)

Even if applied only to indoor nude dancing before consenting adults, this case potentially invalidates the indecent exposure or public indecency statutes of 17 states (in addition to Indiana) with statutes that proscribe public nudity without

expressly requiring lack of consent or offense on the part of the viewer.[6]

C. This case is an appropriate vehicle for deciding the questions presented.

For several reasons, this case presents the issues surrounding nude dancing under the First Amendment in a direct manner.

As noted, the state law invalidated by the Seventh Circuit is typical of public indecency or indecent exposure statutes in force in many states, and the case will have widespread relevance. The dancing involved represents typical nude "go-go" dancing performed in typical establishments, and the videotape submitted by the plaintiffs is clear and accurate evidence of the nature of the dancing. There are no material factual disputes; both of the questions presented were addressed on the merits by the court of appeals.

One of the respondent businesses (Glen Theatre, Inc.) and its dancers (Sutro and Johnson) do not sell or serve alcoholic beverages, and the statute is not limited to establishments that do so. Therefore the First Amendment issue is not clouded by the applicability of the Twenty-first Amendment, as it has been in other cases. See *California v. LaRue*, *supra*; *New York State Liquor Authority v. Bellanca*, *supra*; *City of Newport, Kentucky v. Iacobucci*, *supra*.

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[6] See Ark. Stat. Ann. § 5-14-112; Colo. Rev. Stat. § 18-7-301; Conn. Gen. Stat. Ann. § 53a-186; Del. Code Ann. tit. 11, § 1341; Fla. Stat. Ann. § 800.03 (West); Ga. Code Ann. § 16-6-8 (1981); Ill. Ann. Stat. ch. 38, § 11-9 (Smith-Hurd); Kan. Stat. Ann. § 21-3508 (Supp. 1990); La. Rev. Stat. Ann. § 14:106A(1); Md. Ann. Code art. 27, § 335A; Mass. Gen. L. Ann. ch. 272, § 53; Mich. Comp. Laws Ann. § 750.335a; Minn. Stat. Ann. § 617.23; Miss. Code Ann. § 97-29-31; Nev. Rev. Stat. § 201.220; N.C. Gen. Stat. § 14-190.9; Or. Rev. Stat. § 163.445; S.C. Code Ann. §§ 16-15-130, 16-15-365 (Supp. 1989); Vt. Stat. Ann. tit. 13, § 2601 (Supp. 1989); Va. Code Ann. § 18.2-387; Wisc. Stat. § 944.20; Wyo. Stat. § 6-4-201(a); see also D.C. Code Ann. § 22-1112; V.I. Code Ann. tit. 51, § 1021; Cal. Penal Code § 314 (West) (permitting local ordinances).

Neither is the case complicated by the possibility that the dancing is outside the First Amendment because it is obscene, the defendants having conceded that point in both the court of appeals and the district court. (App. 3; 154 n. 3.) Thus the case is distinguished from *Young v. Arkansas*, 474 U.S. 1070 (1986), in which the dancer arguably performed an obscene dance, and the state court did not consider her claim as to nonobscene dancing. See *Young v. State*, 286 Ark. 413, 692 S.W.2d 752, 754 (1985).

For these reasons, this case presents important issues of federal law which should be settled by this Court. U.S. Sup. Ct. R. 10.1(c).

II. THE SEVENTH CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF STATE COURTS OF LAST RESORT.

The Seventh Circuit has held that Indiana's public indecency statute, which generally prohibits nudity in public places, violates the First Amendment when applied to nonobscene nude dancing of the barroom variety. In reaching this conclusion, the majority held "as a matter of law" that such dancing "performed as entertainment is expression," and thus amounts to protected speech. (App. 8.) This finding was based on the conclusion that dance is "[i]nherently . . . the communication of emotion or ideas" (App. 9), and that barroom nude dancing communicates an "emotional" theme of "eroticism and sensuality" (App. 11).

This holding is clearly in conflict with decisions of the Indiana Supreme Court upholding and applying the same statute, *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980), and *Dove v. Indiana*, 449 U.S. 806 (1980); and *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984). In *Baysinger*, in the absence of a claim that the nude dancing at issue involved expression of ideas, the court held that the activity was "conduct, not speech," and therefore not within the First Amendment. 397 N.E.2d at 587.

Other state courts of last resort have reached the same conclusion. The leading decision is *City of Portland v. Derrington*, 253 Or. 289, 451 P.2d 111, 113-114, *cert. denied* 396 U.S. 901 (1969), in which the court held that nude barroom dancing lacked elements of communication, and was performed solely as part of the commercial enterprise of the establishments involved. The court concluded that the dancing was mere conduct, which brought it within the police powers of the state.

In *Hoffman v. Carson*, 250 So.2d 891, 893-894 (Fla.), *appeal dismissed for want of substantial federal question* 404 U.S. 981 (1971), the court rejected a nude dancer's claim that her dancing was an "artistic endeavor" protected by the First Amendment. Under the circumstances, the court held that she had lost sight of "the distinction between speech and conduct," and noted that the act of appearing nude in public was a crime at common law.

In *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483, 487-488 (1972), the court held that nude barroom dancing is conduct not protected by the First Amendment. The holding did not turn on the fact that alcoholic beverages were served on the premises.

In *Robinson v. State*, 253 Ark. 882, 489 S.W.2d 503, 504-505 (1973), nude dancing was held to have "nothing to do with the 'exercise of freedom of expression,'" but "consisted entirely of the conduct of appearing naked" in violation of Arkansas' public indecency law, notwithstanding the fact that the dancers' breasts were painted on stage before they danced.

In *Gabriele v. Town of Old Orchard Beach*, 420 A.2d 252 (Me. 1980), the court held that barroom nude dancing did not contain sufficient communication of content that its proscription was an unconstitutional abridgement of speech. While the decision also mentions the States' police powers under the Twenty-first Amendment, it is clear that the court's conclusion is based

primarily on the nature of the dancing. The court relied heavily on this Court's dismissal of the appeals in *Baysinger, supra*.

Most recently, the court in *State v. Walters*, 440 So.2d 115, 121-122 (La. 1983), found no First Amendment violation in applying Louisiana's indecent exposure statute to women exhibiting their genitals in glass booths without music. The next year an intermediate appellate court reached the same conclusion as to nude dancers, and the supreme court denied review. *State v. Jacobson*, 459 So.2d 1285, 1289-1290 (La. App. 1984), *writ denied id.* (La. 1985).

Finally, at least one intermediate appellate court has concluded that Michigan's indecent exposure statute could be constitutionally applied to nude dancing because it was not designed to prohibit speech. The Michigan Supreme Court denied review. *People v. Wilson*, 95 Mich. App. 440, 291 N.W.2d 73, 74-75, *leave to appeal denied* 409 Mich. 925 (1980).

These opinions demonstrate that the Seventh Circuit "has decided a federal question in a way in conflict with a state court of last resort," a consideration which demonstrates the need for this Court to grant the writ of certiorari. U.S. Sup. Ct. R. 10.1(a).

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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